

**Routine Program Change
To
Commonwealth of Virginia Coastal Zone Management
Program**

**Draft Request for Concurrence
December 2008**

Coastal Primary Sand Dunes and Beaches
Code of Virginia Title 28.2, Chapter 14

FY 2007 Task 1.04
Product # 3

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This report was funded by the Virginia Coastal Zone Management Program at the Department of Environmental Quality through Grant #NA07NOS4190178 Task 1.04 of the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, under the Coastal Zone Management Act of 1972, as amended. The views expressed herein are those of the authors and do not necessarily reflect the views of the U.S. Department of Commerce, NOAA, or any of its subagencies.



INTRODUCTION

The following constitutes a request by the Commonwealth of Virginia for the National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management (OCRM) to concur in a Routine Program Change to the Commonwealth of Virginia's Coastal Management Program (CMP).

The Commonwealth of Virginia has revised the Commonwealth's enforceable policies in Code of Virginia title 28.2, Chapter 14, known as the Coastal Primary Sand Dunes and Beaches Program.

In accordance with the requirements for Routine Program Changes as set forth in Coastal Zone Management Act (CZMA) §306(e), 15 C.F.R. §923.84, and OCRM's 1996 Program Change Guidance, the Commonwealth of Virginia has prepared the following analysis explaining why the proffered changes to the CMP are Routine Program Changes and not Amendments as described in 15 C.F.R. §923.80(d); and identifying the enforceable policies, describing the nature of each change, and examining the impact the changes have on the existing management program.

ANALYSIS

The statutory sections governing the *Coastal Primary Sand Dunes and Beaches Program* were previously approved as part of the CMP in 1986, and updated through a Routine Program Change (RPI Number One) in 1988. Several sections dealing with enforcement were further updated through a Routine Program Change (RPI 93-1) in 1993.

This submission updates the program to reflect minor statutory changes in 1992, 1994, 1995, 1998, and 2008.

(A) Routine Program Change

This analysis notifies OCRM of the Routine Program Change and explains why the program change will not result in an Amendment. Under 15 C.F.R. §923.80(d), amendments are defined as substantial changes in one or more of the five listed coastal management program areas:

- (1) uses subject to management;
- (2) special management areas;
- (3) boundaries;
- (4) authorities and organization
- (5) coordination, public involvement and national interest.

OCRM's Program Change guidance states that a substantial change is a high threshold based on a case-by-case determination. Such determination is made by reviewing indicators of substantial change, such as whether new or revised enforceable policies

address coastal uses or resources not previously managed, or make major changes in the way a state CMP manages coastal uses or resources. OCRM's Program Change guidance also states that an explanation why a proposed change will not result in an Amendment should describe the elements of the State CMP that are affected.

The statutory provisions being submitted are primarily recodifications giving new section numbers to the statutory provisions *already approved* by NOAA as part of the original program.

The statute was originally found at former Va. Code 62.1-13.21 through 62.1-13.28. In 1992, the Virginia General Assembly recodified the Coastal Primary Sand Dunes and Beaches statute to Va. Code 28.2-1400 et seq., reorganizing the prior sections for easier use, greater precision and clarity.

Additionally, in 1992 provisions were added to this chapter to make it more uniform with those parallel provisions in the Wetlands Program that describe the functions and processes of the Virginia Marine Resources Commission ("Commission") and the local government wetlands boards that have jurisdiction over both wetlands and coastal dunes ("wetlands boards").¹ This too was a minor change. Former Va. Code 62.1-13.27, an approved part of the CMP for the Coastal Primary Sand Dunes and Beaches Program, specified that "in administering the provisions of this chapter...the Commission, Commissioner or wetlands board as appropriate shall, as to the Coastal Primary Sand Dune Protection Act or an ordinance adopted pursuant thereto, bear all those duties and responsibilities and follow those procedures specified in §§62.1-13.7 through 62.1-13.19 of the code of Virginia in the same manner and on the same basis as they administer and enforce the Wetlands Act or an ordinance adopted pursuant thereto." In the 1992 recodification, the legislature set out each of the administrative sections separately in the new 28.2, Ch. 14. Thus, there is no change in administration, but there are new, separate section numbers.

Other minor updates to the program included authorizing representatives of the Commissioner and board chairman to sign documents, empowering the Town of Cape Charles to enact a wetlands zoning ordinance, authorizing wetlands boards to appoint alternate members, authorizing the Commission to develop administrative procedures to expedite permits and minor stylistic changes in language. In 1994, the word "town" was added to those provisions that describe the governing bodies that are authorized to act under the statute. This change maintains consistency in Title 28.2, which from its inception and as former Title 62 has recognized towns among the governing bodies authorized to participate in the management of wetland programs. In 2008, the legislation was amended to specifically authorize all tidewater jurisdictions (counties and cities) already authorized to enact wetlands ordinances to also adopt the coastal primary sand dune ordinance, and to add three plant species to the list of species indicating coastal primary dunes. These jurisdictions already had authority to adopt wetlands boards; the statutory amendment confirmed the authority of these jurisdictions to protect beaches and

¹ The Wetlands Program, formerly at Va. Code 62.1-13.1 through 62.1-13.20, was recodified to Va. Code 28.2-1300 et seq.

dunes as well as wetlands along the Chesapeake Bay and its tributaries, by adopting the same model ordinance already applicable elsewhere in the Commonwealth's coastal jurisdictions.

In 1998, clarifying language was added to 28.2-1400 to ensure that mounds of sand, sandy soil or dredge spoil deposited for beach nourishment or replenishment did not themselves either expand or contract the area of the Commission's jurisdiction.

The changes do not substantially affect the uses subject to management under the CMP, special management areas, the boundaries of the coastal zone, authorities and organization, or coordination, public involvement and national interest.

(B) Effect of Changes on Program

Effects on enforceable policies: The enforceable policies for Coastal Primary Sand Dunes and Beaches remain the same as in the approved CMP. The Routine Program Change submitted herein is intended to update the statutory provisions and references implementing these continuing policies.

1992 Changes: The Coastal Primary Sand Dunes and Beaches Program statutes were, at the time of approval of Virginia's CMP located in Va. Code § 62.1-13.21 *et seq.* The legislature recodified these to Va. Code §28.2-1400 *et seq.* New cross-references were supplied in the newly created sections, and minor changes were made to the description of administrative processes.

1994 Changes: The legislature inserted "towns" as authorized acting governing bodies for dunes, which made the statute consistent with the language of the antecedent title and with the wetlands statute. The legislature authorized the Town of Port Charles (already within Northampton County which had full authority to adopt a coastal dunes zoning ordinance) to adopt its own ordinance. This did not expand the geographic coverage or substantive standards already in place under the approved CMP. The legislature also provided for authorized representatives of the Commissioner to sign documents.

1995 Change: The legislature added a cross-reference to 28.2-1503, which expresses the Commission's stewardship responsibilities for the common lands and waters of the Commonwealth.

1998 Change: The legislature provided that mounds of sand, sandy soil or dredge spoil deposited for beach nourishment or replenishment do not themselves either expand or contract the area of the Commission's jurisdiction.

2008 Change: Based on findings of the Virginia Institute of Marine Science, the legislature added three indicator species to those helping to define coastal primary sand dunes, in the definitions section. The legislature also included "all of Tidewater Virginia" among the jurisdictions authorized to adopt the coastal dunes ordinance, 28.2-1403, thus giving the local wetlands boards the same powers throughout the coastal area.

The statutory sections affected by changes are identified in the attached table, which provides a description and analysis of each statutory change submitted, and identifies the Act of the General Assembly and year in which each change was made. The attached Code of Virginia sections highlight the statutory changes where new material, as opposed to mere reorganization, was added.

Statutory Changes: Coastal Primary Sand Dunes and Beaches
Title 28.2 - FISHERIES AND HABITAT OF THE TIDAL WATERS.
Chapter 14
(formerly Va. Code 62.1-13.21 et seq.)

Statutory Change	Status of Law	Change to Law Since CMP Approval	Significance of Change
§ 28.2-1400. Definitions	Part of the original CMP approval [was §62.1-13.21]	<ul style="list-style-type: none"> • Added “town” to the list of types of governing bodies referenced in the statute (1994, c. 112) • Add Japanese sedge, Virginia pine, and broom sedge to the list of indicator species. (2008, c. 20) 	<ul style="list-style-type: none"> • This is an administrative change and does not substantially change special management areas, boundaries, authorities or coordination. The addition of “town” to the list of bodies devolves the decisionmaking process to a subdivision of an already recognized locality, that is, from the county to a subdivision of the county. Furthermore, this chapter of the Va. Code (former §62.1, recodified in 1992 as §28.2) originally listed “towns” among the governing bodies authorized to establish wetlands boards. • Not a substantial change. The three species, along with the ten already listed, are needed to provide a “complete” definition of occurrences.

		<ul style="list-style-type: none"> Added to the list of exclusions from the definition of “coastal primary sand dune” or “dune” any mound of sand, sandy soil or dredge spoil deposited for the purpose of beach replenishment or beach nourishment and adds a prohibition against the slopes of such mounds being used to determine the landward or lateral limits of a coastal primary sand dune (1998, c. 160). 	<ul style="list-style-type: none"> Not a substantial change. The existing exclusion for temporary placement of sand, sandy soil or dredge spoil was extended to clarify that the jurisdiction of the Commission is not expanded nor contracted by artificial beach construction or nourishment.
§ 28.2-1401. Powers and duties of Commission.	Part of the original CMP approval [was §62.1-13.24]	<ul style="list-style-type: none"> Added “towns” to types of governing bodies involved in regulating coastal primary sand dunes and beaches. (1994, c. 112) Changed the wording of the directive that states that the Commission shall manage any coastal primary sand dunes and beaches it receives “so as to maximize their ecological value” to “as provided in Article 2 (§ 28.2 -1503 et seq.) of Chapter 15 of this title.”(1995, c. 850). 	<ul style="list-style-type: none"> <i>See §28.2-1400 supra.</i> Not a substantial change. Article 2 (§ 28.2 -1503 et seq.) of Chapter 15, addressing the Commission’s management of all ungranted shores of the sea, marsh and meadowlands as well as all other lands of the Commonwealth for which management duties have been given to the Commission, reaffirms the Commission’s role as steward for the property interests of the Commonwealth as established in the Virginia Constitution Article XI §1, which is part of the CMP.

<p>§ 28.2-1403. Certain counties, cities and towns authorized to adopt coastal primary sand dune ordinance.</p>	<p>Part of the original CMP approval [was §62.1-13.25]</p>	<ul style="list-style-type: none"> • Added “towns” to the list of types of governing bodies that may adopt the coastal primary sand dune zoning ordinance. Stipulated the Town of Cape Charles as one of the counties, cities and towns that may adopt the ordinance, and added “town” to the list of types of governing bodies described in the definition section of the Coastal Primary Sand Dune Zoning Ordinance (1994, c. 112). • Added 23 counties and 14 cities so that all of Tidewater Virginia with existing power to adopt wetlands boards also can adopt Coastal Primary Sand Dune Zoning Ordinance (2008, c. 20). • Changed reference date for Coastal Primary Sand Dune Zoning Ordinance to October 1, 1992 (1992. c. 836). • Inserted language formerly contained in 	<ul style="list-style-type: none"> • Not a substantial change. The addition of “towns” is an administrative change, which does not substantially change uses, special management areas, boundaries, authorities or coordination. <i>See</i> §28.2-1400 <i>supra</i>. The stipulation of the Town of Cape Charles was in response to a request received by the Commission from the Town, within Northampton County, to establish a wetlands board to administer the Coastal Primary Dune Zoning Ordinance. • Not a substantial change. These jurisdictions already have power to protect tidal wetlands. Virginia Institute of Marine Science notes that this will enable local protection of beaches or dunes along up to 78 shoreline miles of Chesapeake Bay and tributaries, out of 7200 total miles. • Not a substantial change; conforms reference to 1992 recodification. • No change; language from
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		<p>62.1-13.21 as a new subsection 9 to Coastal Primary Sand Dune Zoning Ordinance (1992, c. 836).</p> <ul style="list-style-type: none"> Added to the list of exclusions from the definition of “coastal primary sand dune” or “dune” in the Coastal Primary Sand Dune Zoning Ordinance any mound of sand, sandy soil or dredge spoil deposited for the purpose of beach replenishment or beach nourishment and adds a prohibition against the slopes of such mounds being used to determine the landward or lateral limits of a coastal primary sand dune. (1998, c. 160). 	<p>original approved program.</p> <ul style="list-style-type: none"> Not a substantial change. <i>See</i> §28.2-1400 <i>supra</i>.
§28.2-1404. Meetings, quorum, rules, etc., of wetlands boards; records and reports.	Part of the original CMP approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19]	<ul style="list-style-type: none"> Remained unchanged from §62.1-13.7 except for minor stylistic alterations and omission of clause concerning election of board officers (1992, c. 836) 	<ul style="list-style-type: none"> Not a substantial change. Except for the omission of the clause concerning the election of officers, this provision is uniform with §28.2-1304 governing the same issues, which as former §62.1-13.7 was part of the original CMP approval.
§ 28.2-1405. Local governing body to supply meeting space and services for wetlands board.	Part of the original CMP approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19].	<ul style="list-style-type: none"> Remained unchanged from §62.1-13.8 except for removal of clause concerning removal of a board member (1992, c. 836) Added “town” to the list of types of governing bodies that must supply the board with reasonable meeting space and 	<ul style="list-style-type: none"> Not a substantial change. This provision is uniform with §28.2-1305 governing the same issues, which as former §62.1-13.8 was part of the original CMP approval.

		necessary secretarial, clerical, legal, and consulting services. (1994, c. 112)	• <i>See</i> §28.2-1400 <i>supra</i> .
§ 28.2-1406. Permits required for certain activities; issuance of permits by Commission.	Part of the original CMP approval [was §62.1-13.26].	<ul style="list-style-type: none"> • Added “town” to the list of types of governing bodies referenced (1994, c. 112) • Adds the Commissioner’s authorized representative as authorized signatory (1994, c. 125). 	<ul style="list-style-type: none"> • <i>See</i> §28.2-1400 <i>supra</i>. • Not a substantial change. The signature authorization is a minor administrative change effected to facilitate the workings of the Commission.
§28.2-1407. Administrative procedures.	Part of the original CMP approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19].	• Recodification of former 62.1-13.5:2 as cross-referenced in 62.1-13.27 (1992, c. 836).	• Not a substantial change. This provision is uniform with §28.2-1307.A governing the same issues, which as former §62.1-13.5:2 was cross-referenced in the original CMP approval.
§28.2-1408. Standards for use of coastal primary sand dunes.	Part of the original CMP approval [was §62.1-13.23]	• No change except for minor stylistic alterations.	• Not a substantial change.
§28.2-1410. Commissioner to review all decisions of wetlands boards.	Part of the original CMP approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19].	• Amended language to require Commissioner to request the Commission to review a decision only when he believes the local board failed to fulfill its responsibilities under the coastal primary dune zoning ordinance. (1992, c. 836)	• Not a substantial change. This provision is uniform with §28.2-1310 governing the same issues, which as former §62.1-13.10 was part of the original CMP approval.
§28.2-1411. When Commission to review decision of wetlands board.	Part of the original CMP approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19]..	• Deleted language specifying grounds for Commissioner to request review of decision, which are now in §28.2-1410 (1992, c. 836).	• Not a substantial change. The grounds for the request for review are now in §28.20-1410. This provision is uniform with §28.2-1311 governing the same issues, which as former §62.1-13.11 was

		<ul style="list-style-type: none"> Added “town” to the list of types of governing bodies that have established wetlands boards whose decisions may be reviewed by the Commission (1994, c. 112). 	<p>part of the original CMP approval.</p> <ul style="list-style-type: none"> <i>See</i> §28.2-1400 <i>supra</i>.
§ 28.2-1412. Procedure for review; notice of decision.	Part of the original CMP approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19].	<ul style="list-style-type: none"> Added the requirement for the Commission to notify the parties of its decision with 48 hours of the appeal or review hearing (1992, c. 836) Added “town” to the list of types of governing bodies to which the Commissioner may give notice of review and notice of decision (1994, c.112). 	<ul style="list-style-type: none"> Not a substantial change. This provision is uniform with §28.2-1312 governing the same issues, which as former §62.1-13.12 was part of the original CMP approval. <i>See</i> §28.2-1400 <i>supra</i>.
§28.2-1413. When Commission to modify, remand or reverse decision of wetlands board	Part of the original CMP approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19].	<ul style="list-style-type: none"> Specified as grounds for the Commission to modify, remand or reverse the decision of a wetlands board, the failure of the board “to fulfill its responsibilities under the coastal primary sand dune zoning ordinance. (1992, c. 836) 	<ul style="list-style-type: none"> Not a substantial change. This provision is uniform with §28.2-1313 governing the same issues, which as former §62.1-13.13 was part of the original CMP approval.
§28.2-1414. Time for issuance of permit	Part of the original CMP approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19].	<ul style="list-style-type: none"> Remained unchanged from §62.1-13.14:1 except for minor stylistic changes (1992, c. 836) 	<ul style="list-style-type: none"> Not a substantial change. This provision is uniform with §28.2-1314 governing the same issues, which as former §62.1-13.14:1 was part of the original CMP approval.

§ 28.2-1415. Judicial review.	Part of the original CMP approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19].	<ul style="list-style-type: none"> • Declares that judicial review shall be pursuant to the provisions of the Administrative Process Act (§2.2-4000 et seq.). (1992, c. 836) • Added “town” to the governing bodies which may appeal a Commission decision (1994, c. 112). 	<ul style="list-style-type: none"> • Not a substantial change. This provision is uniform with §28.2-1315 governing the same issues, which as former §62.1-13.15 was part of the original CMP approval. • <i>See</i> §28.2-1400 <i>supra</i>.
§28.2-1416. Investigations and prosecutions	Part of the original CMP approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19]..	<ul style="list-style-type: none"> • Remained unchanged from §62.1-13.16 except for minor stylistic changes (1992, c. 836) 	<ul style="list-style-type: none"> • Not a substantial change. This provision is uniform with §28.2-1316 governing the same issues, which as former §62.1-13.16 was part of the original CMP approval.
§28.2-1417. Monitoring, inspections, compliance, and restoration	Approved as part of CMP through Routine Program Change RPI 93-1 in 1993. Enacted as §62.1-13.16:1 in 1987, and amended in 1990, c. 811.	<ul style="list-style-type: none"> • Remained unchanged except for minor stylistic changes (1992, c. 836) 	<ul style="list-style-type: none"> • Not a substantial change.
§28.2-1418. Violations; penalty	Part of the original CMP approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19]..	<ul style="list-style-type: none"> • Remained unchanged from §62.1-13.18 except for minor stylistic changes (1992, c. 836) 	<ul style="list-style-type: none"> • Not a substantial change. This provision is uniform with §28.2-1318 governing the same issues, which as former §62.1-13.18 was part of the original CMP approval.
§28.2-1419. Injunctions	Part of the original CMP	<ul style="list-style-type: none"> • Remained unchanged from §62.1-13.18:1 	<ul style="list-style-type: none"> • Not a substantial change. This

	approval [§62.1-13.27 provided that boards would follow same procedures as wetlands boards at §62.1-13.7 through §62.1-13.19].	except for minor stylistic changes (1992, c. 836).	provision is uniform with §28.2-1319 governing the same issues, which as former §62.1-13.18:1 was part of the original CMP approval.
§28.2-1420. Penalties	Approved as part of the CMP through RPI 93-1 in 1993. Enacted as §62.1-13.27:1 in 1990, c. 811.	<ul style="list-style-type: none"> Remained unchanged except for minor stylistic changes (1992, c. 836). 	<ul style="list-style-type: none"> Not a substantial change.